



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

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EPA Region 10
Office of the Regional Administrator

June 29, 2018

VIA CERTIFIED MAIL

Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Chris Hladick, Regional Administrator
U.S. Environmental Protection Agency Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: Notice of Intent to Sue Pursuant to 33 U.S.C. § 1365 for Failure to Perform Mandatory Duty to Review and Act on Idaho's Site-Specific Temperature Criteria for the Snake River from Hells Canyon Dam to the Salmon River (Idaho Docket 58-0102-1102)

Dear Messrs. Pruitt and Hladick:

The State of Idaho, Department of Environmental Quality (Idaho) respectfully gives notice of its intent to file suit under 33 U.S.C. §1365(a)(2) against you, in your respective official capacities as the Administrator of the Environmental Protection Agency (EPA) and Regional Administrator of EPA Region 10, for failure to perform a mandatory duty under the Clean Water Act. Idaho's contact information for purposes of this notice is: Idaho Department of Environmental Quality, 1410 N. Hilton, Boise, Idaho 83706-1255, (208) 373-0494. Idaho is represented in this matter by the undersigned Deputy Attorney General.

Idaho undertook rulemaking in 2010 to revise its water temperature criteria to protect fall spawning of Chinook salmon in the portion of the Snake River from Hells Canyon Dam to the Salmon River. Based on the rulemaking record, Idaho determined a site-specific temperature criterion of 14.5° Celsius is protective of Snake River fall-run Chinook spawning during the two-week period from October 23 to November 6. Idaho retained a 13° Celsius criterion for the remainder of the spawning and incubation period, from November 7 through April 15. These site-specific temperature criteria were duly adopted under Idaho law, approved by the Idaho Legislature, and became final and effective under Idaho law on March 29, 2012.

As required by 33 U.S.C. § 1313(c)(2)(A), Idaho submitted the revised temperature criteria to EPA Region 10 for review and approval on June 8, 2012.¹ To date, EPA has not acted to approve or disapprove Idaho's submittal.

"Under the CWA, 33 U.S.C. § 1313, the Administrator has a mandatory duty to review any new or revised state water quality standards." *Miccosukee Tribe of Indians of Fla. v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997); *see also Natural Res. Def. Council v. McCarthy*, 231 F.Supp.3d 491, 502 n.10 (N.D. Cal. 2017) ("EPA's duty to review revised water quality standards is clear-cut."). Specifically, 33 U.S.C. § 1313(c)(3) requires EPA to review and approve or disapprove a state's submittal of revised water quality standards within fixed statutory timeframes. If the submittal meets the requirements of the Act, the Administrator must approve the submittal "within sixty days after the date of submission." 33 U.S.C. § 1313(c)(3). And, if the Administrator disapproves the submittal, "he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements." *Id.* Likewise, EPA's regulations implementing the Clean Water Act mandate the Regional Administrator "shall either: (1) [n]otify the State within 60 days that the revisions are approved, or (2) [n]otify the State within 90 days that the revisions are disapproved," specify changes necessary to meet the requirements of the Act, and explain why the State's submittal is not in compliance with such requirements. 40 C.F.R. §131.21(a).

Over 2,200 days have passed since Idaho submitted the site-specific temperature criteria to EPA for review and approval. In a letter sent to Administrator Pruitt on December 4, 2017, the Governor of Idaho, C.L. "Butch" Otter, noted that EPA's decision on Idaho's submittal was long overdue and requested that EPA approve the submittal. Regional Administrator Hladick responded to Governor Otter's letter on April 23, 2018, acknowledging that EPA has not acted on Idaho's submittal. Regional Administrator Hladick then explained "EPA is focusing its efforts on coordination . . . to resolve the last details" of the ongoing Federal Energy Regulatory Commission re-licensing of the Idaho Power Company's Hells Canyon Complex "instead" of fulfilling its mandatory duty to review and act on Idaho's submittal. EPA's preference to focus on the re-licensing proceeding does not fulfill the agency's duty, nor would it be a lawful basis for disapproving Idaho's submittal.

EPA's continuing failure to review and act on Idaho's submittal, as mandated by 33 U.S.C. § 1313(c)(3), is "a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator" and is actionable under the Clean Water Act's citizen suit provision. 33 U.S.C. § 1365(a)(2). Additionally, EPA's continuing failure to review and act on Idaho's submittal within a reasonable time constitutes "agency action unlawfully withheld or unreasonably delayed," in violation of the Administrative Procedure Act. 5 U.S.C. §706(1). Therefore, Idaho is providing this notice of intent to sue pursuant to 33 U.S.C. § 1365(b).

The Idaho Power Company already has filed suit against EPA in the District of Idaho (Case No. 1:18-cv-255-REB), alleging EPA is in violation of the Clean Water Act and the Administrative

¹ Information about Idaho's rulemaking, including the documents provided in Idaho's June 8, 2012 submittal to EPA, is available at: <http://www.deq.idaho.gov/laws-rules-etc/deq-rulemakings/docket-no-58-0102-1102-final-rule/>.

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Procedure Act for failing to timely act on Idaho's June 8, 2012 site-specific temperature criteria submittal. Unless EPA takes the required action before the end of the applicable notice period, Idaho intends to intervene in that lawsuit and to compel EPA to review and act on Idaho's submittal. A copy of the Idaho Power Company's complaint is enclosed and includes the above-referenced letters from Governor Otter and Regional Administrator Hladick.

Through this notice, Idaho offers EPA the opportunity to avoid litigation by fulfilling its mandatory duty to review and act on Idaho's submittal. Please do not hesitate to contact me to discuss a mutually acceptable resolution to this matter.

Sincerely,

LAWRENCE G. WASDEN
Idaho Attorney General



Mark Cecchini-Beaver
Deputy Attorney General
1410 N. Hilton, 2nd Floor
Boise, Idaho 83706-1255
(208) 373-0494
*Counsel for the State of Idaho,
Department of Environmental Quality*

MCB/cr

Enclosure

c (via certified mail):

Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
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SHiger@idahopower.com

Attorneys for Idaho Power Company

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

IDAHO POWER COMPANY,

Plaintiff,

vs.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, AND SCOTT PRUITT, IN
HIS OFFICIAL CAPACITY AS
ADMINISTRATOR OF EPA, AND
CHRIS HLADICK IN HIS OFFICIAL
CAPACITY AS ADMINISTRATOR
OF EPA REGION 10,

Defendants.

Case No. _____

COMPLAINT

(Clean Water Act, Administrative Procedure
Act)

EPA has a mandatory duty under the CWA to approve the state's standard within 60 days of submission or EPA must advise the state of specific changes necessary for the standard to comply with the CWA within 90 days of submission. As of this date, EPA has done neither. No action has been taken by EPA for over five (5) years, in violation of the CWA.

PARTIES

V.

Idaho Power is an Idaho corporation with its principal place of business in Boise, Idaho. Idaho Power is a citizen authorized under the CWA to bring an action under the citizen suit provisions of the CWA. Idaho Power owns and operates the Hells Canyon Complex of hydroelectric projects on the Snake River just upstream of the portion of the Snake River affected by Idaho's site-specific standard. Idaho Power is significantly, directly and adversely affected by EPA's actions and inactions described in this Complaint.

VI.

EPA is the federal agency charged with administering the Clean Water Act. EPA is obligated to timely review promulgation of state water quality standards. EPA does not have the primary responsibility under the ESA for identification of the needs of listed species. EPA maintains an office in Boise, Idaho. Defendant Scott Pruitt is the Administrator of EPA charged with ensuring that EPA carries out its legal duties. Administrator Pruitt has ultimate responsibility over EPA's review of state water quality standards and EPA's consultation with the Services. Defendant Chris Hladick is the Administrator of EPA Region 10 and is responsible for the action and inaction of EPA's Region 10 office, including EPA's action and inactions described herein.

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Federal Power Act (“FPA”), Idaho Power was granted a license in 1955 to operate these three facilities as a single project (Project No. P-1971). In 2003, Idaho Power filed an application with the Federal Energy Regulatory Commission (“FERC”) to relicense the HCC under the FPA. The original license for the HCC expired in 2005. Idaho Power has been operating the HCC under annual licenses issued by FERC since that time.

XI.

In conjunction with the licensing of the HCC, Idaho Power has applied for certifications under § 401 of the CWA from the states of Oregon and Idaho that discharges from the HCC comply with state water quality standards. One of the water quality standards involved in the § 401 certification process is the standard for salmonid spawning in the Snake River below Hells Canyon Dam, the most downstream dam of the HCC.

XII.

In 2010, Idaho Power petitioned the Idaho Department of Environmental Quality (“DEQ”) to adopt a revised site-specific standard for salmonid spawning in the Snake River below Hells Canyon Dam. In response to that petition, DEQ initiated negotiated rulemaking under Idaho law. Idaho Power, EPA, NOAA Fisheries, the U.S. Fish and Wildlife Service and others participated in that rulemaking. EPA commented to DEQ that EPA preferred that DEQ not adopt the site-specific standard, but instead should keep the existing standard in place during relicensing of the HCC. EPA also expressed “concerns” that Idaho’s proposed standards may affect a listed species, Snake River fall Chinook, but offered no specific scientific data or analysis in support of those concerns. EPA did not consult with NOAA Fisheries over its “concerns.” EPA provided no scientific data to DEQ during the rulemaking process, suggesting that the proposed site-specific rule did not comply with the CWA.

in part on this evidence, DEQ determined that the new site-specific standard is protective of Snake River fall Chinook spawning.

XVI.

In 2009, the United States Department of Justice, on behalf of the United States, stated before the United States District Court for the District of Oregon that “Snake River fall Chinook is [sic] doing great. This is a great ESU for us. It’s one of our stars.” The Department of Justice further advised that court, that “for five of the last six years Snake River fall Chinook has been over the recovery criteria.”

XVII.

Based on NOAA’s expert opinions about the needs of the species, outside scientific peer review of the proposal and other technical data and scientific analysis submitted in the rulemaking, DEQ modified the rule originally proposed by Idaho Power, finalized and submitted this site-specific standard to protect Snake River fall Chinook spawning in the Snake River below Hells Canyon Dam to the Idaho Board of Environmental Quality on November 11, 2011. The revised site-specific standard provides that for a two-week period, the temperature standard for the period October 23 through November 6 will step down from 19°C to 14.5°C. After November 6, the existing 13°C standard remains in place. DEQ’s site-specific rule was adopted by the DEQ Board. The revised site-specific rule was approved by the 2012 Idaho Legislature and became effective under Idaho law on March 29, 2012.

XVIII.

DEQ submitted Idaho’s site-specific salmon spawning temperature standard to EPA for approval on June 8, 2012. The submittal included a complete administrative record supporting Idaho’s approval of the revised standard describing the methods used and analyses conducted to

state that its site-specific standard complies with the CWA. A copy of Governor Otter's letter is attached as Exhibit B.

XXII.

On April 23, 2018, Regional Administrator, Chris Hladick, wrote to Governor Otter stating that he was responding on behalf of Administrator Pruitt to Governor Otter's December 4, 2017 letter. Administrator Hladick stated that EPA preferred to work with Idaho and Oregon on the states' 401 certifications, and further stated "The EPA has not yet taken action on Idaho's site-specific temperature standard." Administrator Hladick's response requires that Idaho's 401 certification take place under the pre-existing salmonid spawning temperature standard, which directly, substantially and adversely affects the potential conditions of certification and potentially increasing costs of compliance to Idaho Power. A copy of this letter is attached as Exhibit C.

XXIII.

By failing to act on Idaho's submission of its standard in the statutorily required timeframes, EPA is continuously violating a nondiscretionary duty under the CWA on a daily basis. 33 U.S.C. § 1313(c)(3) & (4).

LEGAL BACKGROUND

I. The Clean Water Act

XXIV.

Under the CWA, states have primary responsibility for establishing water quality standards. States must submit those standards to EPA for review and approval before they become effective. 33 U.S.C. § 1313(c)(2)(a); 40 C.F.R. § 131.6. EPA's review is limited. EPA's regulations specifically contemplate that states may adopt site-specific standards. EPA's Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards

submission of water quality standards. EPA has not notified Idaho of any procedural deficiencies with DEQ's June 8, 2012 submission.

XXX.

Idaho's proposed site-specific standard has been pending before EPA for over five (5) years. EPA is violating a nondiscretionary duty under the CWA on a daily basis by failing to take any action on the standard in the statutorily required time frame of 60 to 90 days. 33 U.S.C. § 1313(c)(3).

XXXI.

EPA insistence that Snake River temperature issues be dealt with in the relicensing process of the Hells Canyon Project is not a permissible basis for EPA's refusal to act on Idaho's site-specific standard.

XXXII.

The CWA authorizes suits by citizens against the Administrator where the person alleges a failure of the Administrator to perform a nondiscretionary act or duty under the CWA. 33 U.S.C. § 1365(a)(2)

II. The Administrative Procedure Act

XXXIII.

Under the APA, a court "must set aside an agency's decision if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

XXXIV.

Idaho's revised site-specific standard is based on the best scientific evidence. This evidence was peer reviewed and accepted by leading fisheries scientists. NOAA commented directly to DEQ during the negotiated rulemaking that the revised standard proposed by DEQ is

XXXIX.

EPA's attempt to avoid its legal requirement to timely act on the site-specific standard exceeds EPA's limited regulatory role under the CWA and is arbitrary and capricious. EPA's failure to carry out its nondiscretionary duty to timely act on Idaho's site-specific standard as mandated by the CWA is arbitrary, capricious, not in accordance with law and violates the APA.

CLAIMS FOR RELIEF

COUNT ONE

EPA has Violated a Mandatory Duty Under the CWA by Failing to Act on Idaho's Site-Specific Standard

XL.

Idaho Power repeats and realleges the allegations set forth in all preceding paragraphs, I-XXXIX.

XLI.

States must submit revised or newly adopted water quality standards to EPA for its review. 33 U.S.C. § 1313(c)(2)(A).

XLII.

EPA must notify the state within 60 days if the new or revised standards comply with the CWA, or it must advise the state within 90 days of submittal of what changes are necessary to the standard to comply with the CWA. 33 U.S.C. § 1313(c)(3).

XLIII.

On June 8, 2010, IDEQ submitted its revised site-specific salmonid spawning temperature standard to EPA for approval. EPA has failed to take any action on this standard for over five (5) years.

COUNT THREE

EPA's Consideration of Extra-Scientific Factors in Relation to Idaho Water Quality Standard is *Ultra Vires*, Arbitrary and Capricious and Violates the APA.

L.

Idaho Power repeats and realleges the allegations set forth in all preceding paragraphs, I-XXXIX.

LI.

Under the CWA, Idaho is responsible for establishing water quality standards for its water bodies, including any site-specific standard adopted for salmonid spawning below Hells Canyon Dam.

LII.

EPA's statements in its comments filed with DEQ and in its letter to Governor Otter stating that Idaho should forgo the site-specific standard rulemaking and instead require that relicensing of the Hells Canyon Project take place only under the current salmonid spawning criteria exceeds the authority and regulatory role of EPA under the CWA.

LIII.

EPA must approve water quality standards that meet the requirements of the CWA, and that review is based on whether the state's decision is scientifically defensible and protective of designated uses. 33 U.S.C. § 1313(c)(3). EPA has no discretion or authority to disapprove a state standard that meets these requirements of the CWA.

LIV.

EPA has raised extra-scientific considerations based on EPA's preference for licensing the Hells Canyon Project under the existing standards, rather than carrying out its obligations to review and approve state water quality standards that comply with the CWA. In doing so, EPA

And, Idaho Power prays for the issuance of an injunction, requiring:

1. That EPA and the named Defendants be directed to approve Idaho's site-specific standard within 30 days or provide the state with the notices of the changes necessary to meet the requirements of the CWA.
2. That EPA and the named Defendants be enjoined from relying on EPA's preference to relicense the Hells Canyon Project under the existing standards as a basis for disapproving Idaho's site-specific standard.
3. That EPA and the named Defendants be enjoined to rely upon NOAA Fisheries' expert conclusion of NOAA that Idaho's site-specific standard fully protects Snake River fall Chinook.
4. That EPA and the named Defendants be enjoined from disapproving Idaho's site-specific standard without affirmative demonstration that Idaho's and NOAA's decision that the standard protects the beneficial use of Snake River fall Chinook is not scientifically defensible.

Idaho Power further requests that this Court:

1. Award Idaho Power its reasonable fees, costs, expenses and disbursement, including attorney's fees, associated with this litigation. As a direct and proximate result of the Defendants' failure and refusal to perform their statutory duties to approve or disapprove a state water quality standard in accordance with the Clean Water Act, Idaho Power has been required to employ the services of counsel and has incurred costs and attorney's fees and will continue to incur such costs and fees.
2. Granting such other relief as the Court deems necessary and proper, or that is just and equitable.

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EXHIBIT A

Environmental Protection Agency

October 31, 2013

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I. Summary of Violations

In 2010, in compliance with EPA's regulations, IPC petitioned the Idaho Department of Environmental Quality ("DEQ") to adopt revised site-specific temperature criteria for fall Chinook spawning in the Snake River below Hells Canyon Dam¹. In response to that petition, DEQ initiated negotiated rulemaking, which IPC participated in. After carefully reviewing the evidence submitted in the negotiated rulemaking process, including peer reviews undertaken by eminent scientists in the field of salmon biology and migration and written comments by NOAA Fisheries stating that the proposed standard was fully protective of ESA listed Snake River fall Chinook,² DEQ presented the proposed rule for a site-specific temperature standard to protect fall Chinook spawning in the Snake River below Hells Canyon Dam to the Idaho Board of Environmental Quality on November 11, 2011. The proposed rule was adopted by the Board with no changes. The rule was finalized by the 2012 Idaho Legislature and became effective under Idaho law on March 29, 2012. The revised standard provides for a two week step-down period for transition in temperatures from October 23 through November 6. DEQ submitted its revised site-specific temperature criteria for fall Chinook spawning to EPA on June 8, 2012. This proposed site-specific temperature standard has been pending before EPA for over a year, and EPA is violating a nondiscretionary duty under the CWA on a daily basis by failing to take any action on the standard in the statutorily required timeframe of 60 to 90 days. 33 U.S.C. §1313 (c)(3)&(4).

The critical question in EPA's review of a revised standard under the CWA is whether the standard is protective of the designated beneficial use, in this case fall Chinook spawning below Hells Canyon Dam. ESA Section 7(a)(2) places the additional obligation upon EPA of consulting with NOAA Fisheries or FWS if EPA determines that a new or revised standard may affect an ESA listed species or its critical habitat. Snake River fall Chinook spawn below Hells Canyon Dam and were listed as a threatened species under the ESA in 1992.³ There is clear evidence that Snake River fall Chinook salmon are spawning successfully and that current conditions are supporting the designated beneficial use for the Snake River below Hells Canyon Dam.⁴ Based in part on this evidence, the State of Idaho determined that the revised standard is protective of fall Chinook spawning, and comments filed by NOAA Fisheries in the negotiated

¹ "EPA recognizes that there are instances in which designated uses may be achieved and protected by criteria less stringent than generally applicable water quality criteria." *Idaho Mining Ass'n, Inc. v. Browner*, 90 F. Supp. 2d 1078, 1103 (D. Idaho 2000)(citing 47 Fed. Reg. at 49238: "There are water bodies that support the designated uses even though the Section 304(a) numerical criteria included in the state's standard are exceeded."). EPA thus "promulgated 40 C.F.R. § 131.11(b)(1)(ii) to allow states to modify water quality criteria where the state determines that water conditions are acceptable for the designated use even though the generally applicable criteria are exceeded." *Id.*

² Snake River fall Chinook are listed as a threatened species under the ESA, 57 Fed. Reg. 14653 (April 22, 1992).

³ *Id.*

⁴ Natural adult returns to the Snake River have increased from 78 in 1990 to almost 11,000 in 2012. Total adult returns (natural and hatchery) to the Snake River in 2013 thus far have exceeded 50,000 adults.

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Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). Accordingly, EPA's preference to avoid acting on the site-specific proposal is *ultra vires* of its authority and thus arbitrary and capricious. *NW. Env'tl. Advocates v. U.S. E.P.A.*, 855 F. Supp. 2d at 1231. In any event, DEQ declined to follow EPA's recommendation and adopted the site-specific criteria change. EPA's political preference that DEQ stand down has no bearing on its duty to consult under the ESA or on its duty to act on the lawfully adopted Idaho site-specific criteria change under the CWA.

II. Legal Framework

Under ESA Section 7(a)(2), "[e]ach federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Section 7(a)(2) imposes a procedural duty on the "action agency" (EPA) to consult with the "consultation agency" (i.e., either FWS or NOAA Fisheries) if the agency's action "may affect" a listed species. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1167 (W.D. Wash. 2004) (citing 50 C.F.R. § 402.14(a); *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 974; *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8 (9th Cir. 1994)).

EPA has admitted that approval of state water quality standards triggers a duty to consult under Section 7 of the ESA. See *Sierra Club v. U.S. E.P.A.*, 162 F. Supp. 2d 406, 422 (D. Md. 2001). Furthermore, EPA and the Services have agreed that consultation is required if "EPA determines that its approval of any of the standards may affect listed species or designated critical habitat." *Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act* ("ESA/CWA MOA") 66 Fed. Reg. 11202 (Feb. 22, 2001), at 11214.

Consultation is unnecessary only if the proposed action will have "no effect" on a listed species or critical habitat. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 1579, 185 L. Ed. 2d 575 (2013). Once an agency has determined that a proposed action "may affect" a listed species or critical habitat, the agency must consult with the appropriate expert wildlife agency. *Id.* If EPA and NOAA Fisheries jointly determine that the proposed action is not likely to adversely affect any listed species or critical habitat, no further action is necessary. 50 C.F.R. § 402.13(a) and § 402.14(b)(1).

If no such concurrence is reached between the action agency and the consultation agency, formal consultation must be undertaken. *Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency*, 345 F. Supp. 2d 1151, 1168 (W.D. Wash. 2004) (referencing 50 C.F.R. § 402.13(a); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n. 8).

The ESA "requires federal agencies to consult with the Fish and Wildlife Service or NOAA Fisheries Service *before* taking 'any action authorized, funded, or carried out by such agency' that might harm a listed species." 16 U.S.C. § 1536(a)(2); *Karuk Tribe of California v. U.S.*

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Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotation marks omitted). An agency determination is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004)(citing *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). When EPA interjected the HCC relicensing into its determination on the site-specific criteria water quality standard, it relied on a factor which Congress did not intend it to consider with respect to state water quality standards, and was therefore arbitrary and capricious. EPA's failure to carry out its duty to timely approve or disapprove Idaho's site-specific criteria as clearly mandated by the CWA is arbitrary, capricious, not in accordance with law, and thus a violation of the APA. *Idaho Conservation League v. Browner*, 968 F. Supp. 546, 549 (W.D. Wash. 1997).

Similar allegations regarding EPA's failure to comply with the CWA and ESA with regard to Idaho water quality standards have been made in a case pending before the United States District Court for the District of Idaho, Case No. 1:13-cv-00263-EJL, *Northwest Environmental Advocates v. The National Marine Fisheries Service, et al.* As IPC's substantive rights could be affected by the outcome of that case, it is filing this Notice of Intent at this time so that its rights are not harmed or prejudiced by actions (including actions by EPA) in that separate proceeding.

III. Identity of Counsel

This Notice of Intent is served upon EPA by the Idaho Power Company, which is an investor-owned utility headquartered and incorporated in Idaho, represented in this matter by Senior Counsel James C. Tucker, whose address and contact information is:

James C. Tucker
P.O. Box 70
1221 W. Idaho St.
Boise, ID 83702
(208) 388-2112

IV. Conclusion

EPA has violated the CWA, the ESA and the APA, by failing to act on Idaho's site-specific criteria standard, by failing to consult with NOAA Fisheries before taking action on Idaho's site-specific criteria standard within the time frames required by law, and by injecting extra-scientific considerations into a scientific determination.

If EPA does not cure the violations of law described above immediately, upon expiration of the 60 days IPC intends to file suit against EPA pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(1)(A), the CWA, 33 U.S.C. § 1365(a)(2), and the APA, 5 U.S.C. § 706(2)(A).

The purpose of a NOI is to offer the agency a chance to remedy the violations of its duty before a lawsuit is filed. Accordingly, IPC invites EPA to discuss the significant violations described

EXHIBIT B

December 4, 2017

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fall Chinook salmon continue to spawn in high numbers below Hells Canyon Dam in temperature conditions that are warmer than those adopted in the site-specific standard. EPA is required within 60 days of submission to advise the State that its standards comply with the CWA, or within 90 days of submission provide the State with an explanation of what changes are necessary to comply with the CWA.

Under the statutorily prescribed timeframe, EPA Region 10 was required to either approve the site-specific standard by August 7, 2012 or provide an explanation of necessary changes to Idaho by September 6, 2012. In the nearly 2,000 days that have passed since submittal, EPA Region 10 has done neither. Idaho requests that EPA advise the State that the site-specific standards comply with the requirements of the CWA so that it can become effective immediately.

Thank you for your timely consideration.

As Always – Idaho, “Esto Perpetua”

A handwritten signature in black ink, appearing to read "C.L. Butch Otter". The signature is fluid and cursive, with the first name "C.L." and last name "Otter" clearly legible, and "Butch" in the middle.

C.L. "Butch" Otter
Governor of Idaho

cc: Chris Hladick, EPA Region 10 Administrator
Senator James E. Risch
Senator Mike Crapo
Congressman Mike Simpson
Congressman Raul Labrador



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF THE
REGIONAL
ADMINISTRATOR

APR 23 2018

The Honorable C.L. Butch Otter
Governor of Idaho
State Capitol
Boise, Idaho 83720

Dear Governor Otter:

Thank you for your letter dated December 4, 2017, to Mr. Scott Pruitt, Administrator for the U.S. Environmental Protection Agency. We appreciate you taking the time to write to us about the water temperature standard for the Hells Canyon Reach of the Snake River. Administrator Pruitt has asked that I respond to you on his behalf.

As you note, on June 8, 2012, the state of Idaho submitted a site-specific water temperature standard for the Hells Canyon Reach to the EPA for review and action under the Clean Water Act. During the time of Idaho's rulemaking and subsequent submittal of the site-specific temperature standard to the EPA, there were and continue to be discussions regarding the Federal Energy Regulatory Commission re-licensing of the Idaho Power Company's Hells Canyon Complex. The EPA and Idaho have participated in those discussions for many years together with several other state, federal, and tribal partners. Since 2012, the Idaho Power Company developed the Snake River Stewardship Program as part of the FERC re-licensing process.

The SRSP is an innovative water quality and habitat restoration program that is designed, in part, to provide for attainment of the current temperature standards in Oregon and Idaho, as well as meet other objectives of the parties involved in the re-licensing. Both Idaho and Oregon issued draft CWA 401 certifications in December 2016, which included the SRSP as a means to comply with the current temperature standards. We understand that the states are targeting the end of May or early June for concurrently issuing revised draft 401 certifications that will take into account updated information submitted by Idaho Power.

The EPA has prioritized working with Idaho and Oregon to finalize the CWA 401 certifications and is supportive of the significant progress being made. The EPA has not yet taken action on Idaho's site-specific temperature standard and instead is focusing its efforts on coordination with your Department of Environmental Quality and others in order to resolve the last details regarding the re-licensing, notably including ensuring that the measures to address thermal impacts will be sufficient to allow the states to certify that their temperature standards can be met. As the new Region 10 Administrator, I have followed up with the IDEQ Director John Tippetts and other interested entities to discuss the standard and the most constructive path forward that will allow for the Federal Energy Regulatory Commission's re-licensing of the Idaho Power Company's Hells Canyon Complex. I will maintain regular communication with Director Tippetts as we continue these priority efforts.